

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: : Docket #20cv8924  
IN RE NEW YORK CITY POLICING :  
DURING SUMMER 2020 DEMONSTRATIONS : New York, New York  
: February 13, 2023  
-----: TELEPHONE CONFERENCE

PROCEEDINGS BEFORE  
THE HONORABLE GABRIEL W. GORENSTEIN,  
UNITED STATES MAGISTRATE JUDGE

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None

E X H I B I T S

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None

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THE CLERK: In the matter of In Re New York City Policing During Summer 2020 Demonstrations, case number 20cv8924. Starting with plaintiff's counsel, please state your appearances for the record.

6

MS. SWATI PRAKASH: Good morning, this is Swati Prakash from the New York State Office of the Attorney General for plaintiffs People of the State of New York.

9

MS. LILLIAN MARQUEZ: Good afternoon, Your Honor, this is Lillian Marquez of the Office of the New York State Attorney General on behalf of plaintiffs and the People.

13

MR. WYLIE STECKLOW: Good morning, this is Wylie Stecklow on behalf of the plaintiffs in the matter of Gray, et al. v. City of New York.

16

MR. DANIEL LAMBRIGHT: This is Daniel Lambright for the New York Civil Liberties Union on behalf of the Payne plaintiffs.

19

MS. COREY STOUGHTON: Good morning, Your Honor, this is Corey Stoughton on behalf - good morning, Your Honor, this is Corey Stoughton, also on behalf of the Payne plaintiffs, and I'm only one because I'm here if the Court does decide to address the Conforti motion.

24

MS. TAHANIE ABOUSHI: Good morning, Your Honor, Tahanie Aboushi of The Aboushi Law Firm appearing on

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2 behalf of the Roland plaintiffs.

3 MX. REMY GREEN: And good morning, this is Remy  
4 Green of Cohen & Green on the Sow case, and if the Court  
5 decides to roll in anything about the coordinated cases,  
6 I'm here, I am on behalf of them too. For the  
7 transcript, if we order it, I should appear in the  
8 transcript as Mx. Green, spelled M-X period rather than  
9 Mr. or Ms.

10 MS. GENEVIEVE NELSON: Good morning, Your  
11 Honor, this is Genevieve Nelson for defendants.

12 MR. PETER SCUTERO: Good morning, Judge, this  
13 is Peter Scutero for the defendants.

14 THE COURT: Okay, who is going to be speaking  
15 for plaintiffs on number 774?

16 MR. LAMBRIGHT: I will, Your Honor, Daniel  
17 Lambright.

18 THE COURT: Spell your last name please.

19 MR. LAMBRIGHT: L-A-M as in Mary-B-R-I-G-H-T

20 THE COURT: Okay. And Mr. - Mr. Scutero signed  
21 the letter. You're speaking for defendants?

22 MR. SCUTERO: I will be speaking for the  
23 defendants, Your Honor.

24 THE COURT: Okay. Okay, first, let me just say  
25 we're recording this for purposes of anyone ordering a

1 PROCEEDINGS 6  
2 transcript, but any other dissemination or recording or  
3 broadcast of this proceeding is contrary to law. I'm  
4 going to start with 774, and my plan right now is to go  
5 through the documents and try to give you rulings on  
6 each. So it may be a little bit of a laborious process.  
7 I will just note for the record that it was agreed that  
8 I would decide this based on letters rather than based  
9 on formal briefing.

10 So as I go through, I'm going to try to start  
11 with the law enforcement privileged documents I think.  
12 I'll make the ruling, as to the privilege, if it's  
13 unclear or if I forget to address the issue of need or  
14 substantial need or whatever the standard is for the  
15 particular privilege, I'm counting on the plaintiffs to  
16 remind me. Otherwise, if we just go on, I mean I  
17 thought about need with respect to each of them, if I  
18 haven't articulated it, and if it is something that I  
19 find that there is privilege and you don't remind me and  
20 I keep going, it means that I didn't find there was a  
21 substantial need. So if you think you need to remind me  
22 because I haven't said anything about it, I'm putting it  
23 on the plaintiffs to do that. Mr. Lambright, do you  
24 understand what I'm saying?

25 MR. LAMBRIGHT: Yes, Your Honor.

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THE COURT: Okay, good. The other thing floating out there is attorney-client privilege. So, Mr. Lambright, you need to remind me when we get to that document in case I don't address attorney-client privilege. Is it more than one or just one?

7

MR. LAMBRIGHT: I think there are a few documents where there are attorney-client privilege issues.

10

THE COURT: No, I mean in the sample. You think there's a few?

12

MR. LAMBRIGHT: Yes, in the general but I can check the sample again to see if --

14

THE COURT: All right, well, we're going to go through it document by document. I actually have noticed this too, just in case I miss it, you need to remind me to address attorney-client privilege if I fail to do that.

19

MR. LAMBRIGHT: Yes, Your Honor.

20

THE COURT: And then after we're done with all this, as I said, we may or may not get to 680 which is the after action review briefing. But in any case, to the extent that I found that the privilege was not properly asserted or that I found that the need was there, we need to talk about what we're going to do

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2 about the documents that are not in the sample. You  
3 know, one possible option - I mean my preferred option  
4 is that I can somehow give direction that will cover  
5 other documents. But if that doesn't seem to be what's  
6 happening, you know, another option is to have a quick  
7 process where the City sees that they're willing to, not  
8 willing I guess is the right word, but whether they're  
9 able to apply whatever principles I gave to other  
10 documents, release those, and if there's any left, for  
11 us to figure out what I'm going to do with those.

12       Okay, so having said all that, let me also say,  
13 to the extent I'm going to be ruling, I should let the  
14 record reflect what standards I'm using. For purposes  
15 of law enforcement to me is completely laid out in the  
16 Second Circuit case, (indiscernible) v. City New York.  
17 It's a 7 F.3d 923. As to deliver the process standard,  
18 I've written briefly on this in this case at 563 F.  
19 Supp. 3d 84. And it's also expressed in Second Circuit  
20 decisions such as ACLU v. National Security Agency, 925  
21 F.3d 576. Those are the principles I'm using in making  
22 whatever rulings I make during this phone call.

23       I'm not necessarily planning to do a separate  
24 order after this phone call, so I hope you'll take good  
25 notes as to what I rule as to each document.

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Okay. Looking now at all of the documents.

3

They were in two categories for me, NYPD documents and  
4 OTM, which I guess is the Office of the Mayor documents.  
5 Let's start with the NYPD documents. And let's talk  
6 about the first one which is the Conforti log document  
7 number 39. All right, now I know plaintiffs are  
8 obviously at a disadvantage here. I still thought it  
9 would be helpful for me to get some argument from the  
10 City as to each of the documents, though if you can, Mr.  
11 Scutero, just briefly explain the basis for the law  
12 enforcement privilege on this one.

13

MR. SCUTERO: Good morning, Judge. I  
14 apologize, I didn't realize we were going through the  
15 sample. I thought we were going through all of the  
16 documents that you requested on Friday. And so I do not  
17 have that document in front of me. I can say too though  
18 that --

19

THE COURT: How hard would it be for you to get  
20 that document in front of you? I was planning to go  
21 through the whole sample.

22

MR. SCUTERO: Yeah, I understand, Judge, I  
23 didn't realize we were just, you were just doing the  
24 sample because you requested all the documents on  
25 Friday. I didn't realize we were just limiting

1 PROCEEDINGS 10  
2 ourselves to the sample. But it could take me a few  
3 minutes, I could probably get it.

4 THE COURT: I think it's better. So we'll  
5 wait, and whether you have the sample documents  
6 available, let me know.

7 MR. SCUTERO: I appreciate it, thank you,  
8 Judge. And I do apologize.

9 (pause in proceeding)

10 MR. SCUTERO: Sorry about that, Judge. I do  
11 have the document in front of me. And basically this  
12 document is a slideshow that was prepared with the, in  
13 preparation for the Conforti report, the after-action  
14 report. And it contains information regarding law  
15 enforcement techniques as well as capabilities. It also  
16 contains information relating to individuals who were  
17 subject of investigations and information relating to  
18 confidential sources. Because of those reasons this  
19 document should be protected under the law enforcement  
20 privilege. And plaintiffs have not provided a reason to  
21 rebut that strong presumption that this document should  
22 be protected, and even if they did, the fact that the  
23 information contained in this slideshow contains such  
24 sensitive information, it outweighs any significance or  
25 need for the plaintiffs which they could obtain similar

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2 information through other sources.

3 (pause in proceeding)

4 MR. SCUTERO: Hello?

5 THE COURT: Sorry, sorry, I realized I was on  
6 mute. I just spoke for about 20 seconds. So let me try  
7 it again.

8 What I had said was I quibbled with the last  
9 point that was made which is that the information could  
10 be obtained from other sources. There's actually  
11 information about specific individuals and criminal  
12 activity of those individuals, and I question the model  
13 charged and I questioned whether it could be obtained  
14 from other sources.

15 So let me just turn to plaintiffs to see what  
16 they would like to say on this document. Mr. Lambright.

17 MR. LAMBRIGHT: Yeah, I think, Your Honor, that  
18 these documents go to the core of the claims at issue in  
19 this case. You know, the NYPD and the City has made  
20 assertion that their conduct was reasonable based upon  
21 intelligence and threats, intelligence that they had  
22 about threats of property damage or threats to officers'  
23 safety specifically. But even if (indiscernible) the  
24 privilege accurately applies to this document, it's  
25 clearly overcome by the need for the case given that we

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2 have claims directly related to this. And the  
3 defendants have asserted defenses that kind of rely at  
4 least on the subject matter underlying this report.

5 THE COURT: Okay. So my ruling on this one is  
6 that it clearly fits within the law enforcement  
7 privilege in that it reflects information about specific  
8 information and incidents and techniques. As to whether  
9 it's been overcome, I'm just going to note that the need  
10 to overcome, sorry, the level of showing needed to  
11 overcome the law enforcement privilege is far greater  
12 than what's needed to overcome the deliberative process  
13 period. So my ruling with respect to this document is  
14 not indicative one way or the other as to a ruling with  
15 respect to a document protected solely by deliberative  
16 process.

17 But given the specifics of the information  
18 here, this is not a case that it's, the plaintiffs need  
19 this in order to fairly litigate the case, and the mere  
20 fact that in some generic sense the City might use the  
21 existence of threats or things of that sort as an  
22 explanation for their conduct is not enough to find a  
23 waiver or a sufficient need. So I'm upholding as to  
24 this document which is Conforti log document number 39.

25 Let's move to the next one. I assume the order

1 PROCEEDINGS 13  
2 in which these documents have been organized and the way  
3 they were sent to me corresponds to something that you  
4 two have. I assume it corresponds to the privilege log,  
5 but my next one ends in 56452. Mr. Lambright, is that  
6 sort of your next one?

7 MR. LAMBRIGHT: I'm trying to find it. Because  
8 56412 --

9 THE COURT: 52, 56452 are the last digits.

10 MR. LAMBRIGHT: Give me one second, Your Honor.

11 THE COURT: Take your time. Mr. Scutero, this  
12 is the order somehow they were, in what was sent to me.  
13 Is this up on your screen?

14 MR. SCUTERO: I'm trying to pull it up now,  
15 Judge.

16 THE COURT: Is there a better way for me to do  
17 this? I mean I don't know how to identify it other than  
18 by the last digits of the Bates number.

19 MR. SCUTERO: Yeah. No, I think that's the  
20 best way to identify it, Judge. I just - you know, if  
21 the Court would just be patient because it does take  
22 some time on our end to pull up each document. Unless  
23 the Court wants to adjourn for a short period, maybe 15,  
24 20 minutes, so we can try and get everything organized  
25 on both sides.

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THE COURT: Okay, I mean I don't think Mr. Lambright has to find the document. He just has to find this entry.

5

MR. LAMBRIGHT: Right, I found it. I found the entry, Your Honor.

7

THE COURT: All right.

8

MR. LAMBRIGHT: It doesn't appear to be in a particular order that sent it in or any kind of particular order, but since I have the document, it's pretty easy for me to pull up.

12

THE COURT: So, Mr. Scutero, I need your judgment. My goal is to be as efficient as possible. You know how many documents there are, 20 or so. What's going to be faster, if I have you pull them up each time? I think I could theoretically email the order - I could email you something that has the order I'm about to do this in. Would you have someone who could work on it while we're doing this?

20

MR. SCUTERO: Yeah, I think that would be helpful, Judge.

22

THE COURT: Let me see if it's actually possible. Hold on a second. I'm cutting a column from an Excel spreadsheet I've created.

25

MR. SCUTERO: Oh, and I do have that document

1 PROCEEDINGS 15  
2 in front of me. I think, Judge, what would be helpful,  
3 because some of the documents have Bates stamps and some  
4 have our control number, if you can reference to us  
5 either whether it starts with DEF or DMN, then I can  
6 navigate to the document a lot quicker.

7 THE COURT: Okay, hold on. I have a list of  
8 the documents in the order. I'm going to try sending  
9 it, hold on, one second.

10 (pause in proceeding)

11 THE COURT: Okay, I just sent it to Mr. Scutero  
12 and Mr. Lambright. Okay, so you think possibly, Mr.  
13 Scutero, someone can, while we're doing this, calling up  
14 those documents for you?

15 MR. SCUTERO: Yes, I do, Judge, thank you.

16 THE COURT: Okay. All right, so let's go to  
17 the next document which is daily intelligence briefing.  
18 Happy to give the whole number, it's DEF PD0056452.

19 MR. SCUTERO: Yes, Judge, I have that document.

20 THE COURT: All right, just give me a moment to  
21 look at my notes.

22 (pause in proceeding)

23 THE COURT: Do you want to talk about this  
24 document?

25 MR. SCUTERO: Sure, Judge. This document

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2 consists of an intelligence briefing from the MTA, and  
3 it includes analysis, news stories, as well as  
4 assessments and definitions relating to terrorism.  
5 Because these documents, because the information within  
6 this document is a compilation of information relating  
7 to terrorism and antiterrorism techniques and  
8 guidelines, it should be protected under the law  
9 enforcement privilege because releasing it would pose a  
10 significant harm to the specific task force that this  
11 briefing was released under.

12 It would show to potential bad actors what  
13 information the MTA and the interagency counterterrorism  
14 task force looks at when investigating terrorism and  
15 when it is preparing and preparing to put into place  
16 antiterrorism measures. This would provide significant  
17 information to bad actors that can help them evade  
18 antiterrorism, the antiterrorism task force in detecting  
19 terrorists, potential terrorists, as well as thwarting  
20 potential terrorist acts. Because of those reasons it  
21 should be protected under the law enforcement privilege.

22 THE COURT: Mr. Lambright.

23 MR. LAMBRIGHT: Your Honor, our understanding  
24 of this document is that it's essentially a roundup of  
25 news sources and other primary open source intelligence.

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2 Defendants have never declared that these contain

3 identities of undercover sources or kind of any real

4 tactics that are used, or confidential tactics that are

5 used by officers in the field. It's hard to see how the

6 release of these documents would undermine the

7 confidentiality of sources or impair future

8 investigations.

9                   Defendants have really, in their letter, only  
10 claimed that these documents contain, quote/unquote,  
11 "institutional thoughts" as to antiterrorism  
12 investigations and NYPD thoughts and concerns about  
13 potential terrorists threats. And these (indiscernible)  
14 an amorphous description just simply do not meet the  
15 standard.

16 And if we look to In Re City of New York, the  
17 field reports that were at issue in those cases and  
18 where the court found that the law enforcement privilege  
19 properly applied involved undercover officers  
20 infiltrating various organizations and the kind of  
21 discussion about those concerns. And similarly in  
22 McNamara, the documents at issue there were scenarios  
23 about kind of hypothetical situation that, an actual  
24 kind of discussions about the weaknesses of the NYPD and  
25 kind of addressing various scenarios that might actually

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2 cause a rift of future harm. And here, or at least from  
3 what we understand it from what the privilege log says,  
4 here it does not appear to be the case.

5 Additionally, we would argue that it's over,  
6 that because it's central to the case, it's overcome,  
7 and additionally there are protective, there's a  
8 protective order in place such that, you know, that  
9 these documents would not be kind of widely distributed  
10 to bad actors as the defense has suggested.

11 THE COURT: So let me ask Mr. Scutero, I feel  
12 there's a difference between pages 1 through 4 of this  
13 document and the remaining pages. Page 1 through 4 are  
14 kind of an assessment of certain factual scenarios and  
15 what they mean. I mean I didn't go through in detail  
16 the remaining pages. It starts with news and then has a  
17 description of a number of news articles, I mean all of  
18 which is sort of completely irrelevant to this case and  
19 maybe that's, that may be my answer. It has nothing to  
20 do with protests in New York City, at least - yeah, I  
21 mean it just has, it basically is just, you can't even  
22 tell what the common theme is necessarily. Most of it's  
23 terrorism. The first story seems to be something else.

24 Anything you want to say about those pages?

25 MR. SCUTERO: Well, Judge, the first four pages

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2 do relate to domestic terrorism, and as you mentioned,  
3 it does make up an assessment by, or it consists of an  
4 assessment by this interagency counterterrorism task  
5 force. And distributing that information would impair  
6 law enforcement's ability to conduct future  
7 investigations because then terrorist actors, the  
8 individuals who are, that this report details would have  
9 this information and know who the task force would be  
10 targeting and what they would be looking at. They would  
11 look, they would have access to the definitions that are  
12 also included in these first few pages that you've  
13 mentioned.

14                 With respect to the other pages, Judge, that  
15 consist of news reports, although these news reports,  
16 plaintiffs have access to because they're public source  
17 documents, the fact that they're compiled together  
18 within this report should also prevent this report from  
19 being released. Because this shows what information law  
20 enforcement is looking at, what information they're  
21 relying on, what information they're assessing in order  
22 to determine how to best counteract terrorist  
23 activities.

24                 And so because it's compiled into one document,  
25 and this goes to the arguments we provided in our papers

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2 with regards to the Knight case, because these articles

3 are all contained in the same papers, in the same

4 report, it would provide information to bad actors and

5 would be a significant danger to not only New York City

6 but also would harm and impair law enforcement's ability

7 to conduct future investigations because terrorists

8 would have or potential terrorists and bad actors would

9 have this information, know how to get around it, know

0 how to, know what task force, antiterrorism task force

1 are looking at when they're investigating them.

12 So for those reasons, Judge, we think that this  
13 should be protected under the law enforcement privilege  
14 and should not be released.

15 MR. LAMBRIGHT: Your Honor, if I may. I'll  
16 just note, again, defense counsel has not addressed the  
17 protective order and the fact that I think at least, I  
18 don't think any counsel is going to provide these  
19 documents to any terrorists organizations.

20 Additionally, I'll just note that the Knight case that  
21 was cited is a FOIA challenge and that distribution in  
22 that case would have necessarily been public and not  
23 subjected to the same type of protective element that we  
24 have in this litigation.

25 | THE COURT: All right. I've considered this

1 PROCEEDINGS 21  
2 document, and I believe that it would seriously impair  
3 the ability of law enforcement agency to conduct future  
4 investigations, to have, you know, its analysis of how  
5 certain acts are to be considered and what kind of acts  
6 are to be considered in assessing threats. Once again,  
7 it's a very high bar for overcoming the law enforcement  
8 privilege in terms of substantial need. I think  
9 plaintiffs can easily litigate this case without this  
10 specific information.

11 And as to the protective order, In re City of  
12 New York was very skeptical about the ability of a  
13 protective order to truly (indiscernible) the interests  
14 of the law enforcement privilege, and given the relative  
15 lack of relevance of a huge portion of this and even to  
16 some degree the beginning portion, I don't think a  
17 protective order is an effective mechanism here. So I'm  
18 going to uphold it as to this document.

19                   The next document is DEF EPD00120004. I think  
20 it's - I'm not sure - I don't think we need to do  
21 anything more on this. It's the same - it's the same  
22 issue that was raised in the other one, unless, Mr.  
23 Lambright, you think there's something different about  
24 this.

25 MR. LAMBRIGHT: No, I think it is the same as

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2 the other document.

3 THE COURT: Okay, so it follows from my  
4 previous ruling. So that's going to be upheld.

5 Okay, I think the next document is actually  
6 deliberative process has been inserted in here. So  
7 maybe I'd like to skip over the one ending  
8 DNNL00251\_000134920. So let's come back to this, don't  
9 let me forget, but I think we have a few law enforcement  
10 privilege ones after this. I'd rather do those.

11 Okay, the next one is DNNL00251\_00160633. Mr.  
12 Scutero, you have that one?

13 MR. SCUTERO: I'm pulling it up now, Judge.

14 THE COURT: You know, actually you can save  
15 yourself some time. This one actually and the next one  
16 which ends 68789 and 17856, they all involve a  
17 confidential source. So, Mr. Lambright, having told you  
18 that, tell me if you have anything else to say on this.

19 MR. LAMBRIGHT: Sure, I would say that even if  
20 a confidential source is involved, you know, there are,  
21 there's an ability to kind of redact the identifying  
22 information of that confidential source. And, again,  
23 given that issues of officer safety and intel are  
24 particularly relevant to this case, and how the NYPD  
25 reacted to the protests are issue, we would argue that

1 PROCEEDINGS 23  
2 even if there's a confidential source, that the  
3 privilege is overcome and that the defense can take  
4 whatever means necessary to redact any confidential  
5 information about that source.

6 THE COURT: Mr. Scutero.

7 MR. SCUTERO: Judge, we would say that we  
8 argued that even redacting that would pose a danger to  
9 the sources and methods by which the NYPD conducts its  
10 investigations, and redaction does not necessarily  
11 segregate all the information that would be harmful to  
12 not only the source but also to the investigation that  
13 these documents are related to.

14 THE COURT: I have to say, there's one of them,  
15 the one ending 60633, Mr. Scutero.

16 MR. SCUTERO: Yes, Judge.

17 THE COURT: It's pretty truncated all this.  
18 There's a source in there somewhere.

19 MR. SCUTERO: Yes, there is, without --

20 THE COURT: Can you tell me what line it is or  
21 something?

22 MR. SCUTERO: I would have to go back to - hold  
23 on one second.

24 (pause in proceeding)

25 THE COURT: Maybe it's in the attachment line.

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2 MR. SCUTERO: I believe it is in the  
3 attachment.

4 THE COURT: Okay.

5 MR. SCUTERO: It is the attachment, Judge.  
6 That is the source.

7 THE COURT: Got it. All right, so the problem  
8 with redacting the name of the source is that the  
9 information from the source can lead back to the source.  
10 If it's any consolation to the plaintiffs, these are  
11 extremely truncated brief emails, making references to  
12 the source, that has very little utility in terms of the  
13 plaintiffs' own case. So the privilege is there.  
14 There's not going to be any great need, and, again,  
15 relying on In re City of New York especially for  
16 something like confidential sources, a protective order  
17 is not sufficient protection. So I'm upholding it as to  
18 those three documents.

19 Okay, I think we now have another deep  
20 deliberative process in the middle of the law  
21 enforcement privilege. It's the one ending 34771. I'm  
22 going to skip over that and come back. And you know  
23 what, the next documents ending, I remember these,  
24 58479, 59557, those next two are the exact same,  
25 undercover source problem. So I'm going to uphold it as

1 PROCEEDINGS 25  
2 to those. I mean undercover or source, one or the  
3 other, or confidential source.

4 Okay, the next law enforcement privilege one is  
5 DNNL00251\_00311632. So if you could call it up, Mr.  
6 Scutero. I'm sorry, I think I jumped ahead. Did I?  
7 So, no, I'm upholding as to, just to be clear, the one  
8 ending 42609, 54769, and 58479, and also 59557. Yeah,  
9 so I'm right. So the one we're up to now is  
10 DNNL00251\_000311632.

11 MR. LAMBRIGHT: And just to be clear, Your  
12 Honor, those are all documents where there is a  
13 confidential informant listed and there's basically not  
14 much substance in the emails. Is that the  
15 understanding?

16 THE COURT: Yeah, I mean if you want me to  
17 verify there's not much content in the emails, I could,  
18 but there was no question, I mean I just remember  
19 looking - I'll look at them again if you want, hold on.

20 (pause in proceeding)

21 THE COURT: Yeah, same thing. Brief emails on  
22 609. Brief email 4769. Same thing with 8479. And  
23 we're skipping 555. Oh, no, 5557, yes, same thing.

24 MR. LAMBRIGHT: Thank you, Your Honor.

25 THE COURT: Okay, and now we're at 11632. Mr.

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2 Scutero, I mean this is a report about a particular  
3 individual, a person of interest. I mean all kinds of  
4 personal information about this person, and I mean it's  
5 just quite obviously a matter that would undermine the  
6 privacy of individuals involved in an investigation.

7 MR. SCUTERO: Yes, we agree --

8 THE COURT: Gang affiliation and all kinds of  
9 stuff. So I'm holding this one too. There's certainly  
10 no need by the plaintiffs, and a protective order is not  
11 going to solve it.

12 Okay, I think there's only, in the next group,  
13 which are the OTM documents, are any of those law  
14 enforcement privilege? I'm trying to look at my listing  
15 here. 6042258 or 323. Yes, 56, 51616, that's the only  
16 one of that group. Do you see the one I'm talking  
17 about? I'll give the full number. It's  
18 DNNL00303\_000151616.

19 MR. SCUTERO: Yes, Judge, I'm pulling it up  
20 now. Judge, I think this falls under the same category  
21 as the other briefing documents that you had already  
22 ruled or upheld the privilege under.

23 THE COURT: Well, this seems like of a  
24 different character because what it is is it seems to be  
25 sort of a summary of how the intelligence bureau

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2 operates. I'm not saying it's not protected or is  
3 protected. It's not like the daily terrorism briefing.  
4 I'm not sure what you were likening this to.

5 MR. SCUTERO: Right, but at the - that is true,  
6 Judge, that it does provide information as to how the  
7 intelligence bureau operates and as such should be  
8 protected. But if you scroll down to the end of the  
9 document in the appendix, it also provides, you know,  
10 information about terrorist plots that are targeting New  
11 York City and emanating from New York City.

12 THE COURT: Yes, okay, and that is easily  
13 protected, but I think you need to talk to me about  
14 whether the first, I mean protected for the same reasons  
15 I said earlier about the daily terrorism briefing of the  
16 same character. But what about the first pages about  
17 the structure and the different units that operate  
18 within and how they operate, just address that please.

19 MR. SCUTERO: Sure, Judge, well, again, this is  
20 information that pertains to techniques and procedures  
21 that the NYPD uses to collect and assess intelligence  
22 with respect to potential crimes. Because of that it  
23 meets that first prong under the law enforcement  
24 privilege and should be protected.

25 I don't - the plaintiffs haven't provided a

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2 compelling need for this information. They argue that  
3 they should be entitled to intelligence relating to the  
4 protests because their argument is that the defendants  
5 have posited a defense that there was no intelligence  
6 with regards to the protests and the NYPD relied upon.

7 But the information --

8 THE COURT: Wait, wait, wait. Say that again.  
9 You said they posited a defense? I didn't follow that.  
10 Try me again.

11 MR. SCUTERO: Yeah, so they, the plaintiffs in  
12 their papers argue that the defendants have put forth a  
13 defense that with respect to intelligence collection,  
14 and if I can just - with respect to intelligence  
15 collection that the defendants relied upon intelligence  
16 in conducting their policing of the protests. The  
17 document that we are currently looking at doesn't have  
18 any information or at least doesn't appear to have  
19 information with respect to - and I'm sorry, the  
20 document, I just lost the document - doesn't appear to  
21 have information relating to policing the protests at  
22 issue here.

23 THE COURT: Well, I mean that's the substantial  
24 need issue is what you're saying.

25 MR. SCUTERO: Yes, they --

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THE COURT: All right - go ahead.

3

MR. SCUTERO: No, I was just arguing that they  
4 don't have a substantial need. We meet the first prong  
5 under the law enforcement privilege because this  
6 information pertains to techniques and procedures. They  
7 now have to rebut that under the strong presumption that  
8 privilege doesn't apply based on a compelling need. Our  
9 argument is that they do not have a compelling need for  
10 this information because it doesn't contain information  
11 with respect to the protests.

12

THE COURT: Okay, Mr. Lambright.

13

MR. LAMBRIGHT: So, again, it's hard to  
14 (indiscernible) not seeing what is actually there. But,  
15 you know, I think maybe it's helpful to kind of just  
16 talk about the importance of intelligence and the kind  
17 of this litigation. You know, the defendants have  
18 constantly asserted that they intelligence that there  
19 are certain threats and that intelligence informed how  
20 they responded to the protests. Obviously, we have  
21 (indiscernible) challenging that the City's response to  
22 the protests.

23

And additionally I'll note that in the DOI  
24 report, one of the major concerns and kind of problems  
25 that were pointed out about the NYPD's response to the

1 PROCEEDINGS 30  
2 protest was faulty intelligence. And, you know, insofar  
3 as, you know, insofar as the document can speak to how  
4 the NYPD collected intelligence and how they collect  
5 intelligence and how, you know, they got faulty  
6 intelligence I think is particularly relevant, and even  
7 if the law enforcement privilege does apply, it should  
8 be overcome by the needs of this case.

9                   And, yeah, that's, you know, and I'll just kind  
10                  of quote the decision by the, in Floyd where, you know,  
11                  the court said that an important factor is whether the  
12                  case is a civil rights case and it's certainly a matter  
13                  here that, it certainly matters here how the NYPD  
14                  conducted its intelligence gathering.

15 THE COURT: Mr. Scutero.

16 MR. SCUTERO: (no response)

17 THE COURT: Mr. Scutero, anything you want to  
18 add to this?

19 MR. SCUTERO: No, Judge.

20 THE COURT: I mean what is the City's plan in  
21 terms of testimony or defense it's going to offer saying  
22 we did X because intelligence told us that, you know, Y  
23 was going to happen?

24 MR. SCUTERO: Well, that is, Judge, that is,  
25 you know, information that the City would rely upon.

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2 THE COURT: Well, I mean is it information in  
3 any of the documents we're talking about?

4 MR. SCUTERO: Well, that's what I was - that's  
5 what I was arguing before that there doesn't appear to  
6 be information in this document that relates to the  
7 protests. I'd have to --

8 THE COURT: Yeah, I agree as to this document,  
9 but I guess maybe I'm reopening my thinking as to other  
10 documents. I agree, this document - I'm not even sure  
11 why it was considered relevant except that it summarizes  
12 I guess how the intelligence bureau works, maybe that's  
13 viewed as having some relevance. I don't think it's  
14 really very, I don't think, you know, what units they  
15 operate under and how those units operate are sufficient  
16 relevance to overcome the privilege. But I'm just now  
17 going back, you know, to some of the other documents  
18 that had some specific intelligence. I mean obviously  
19 the City is not going to be able to use those documents  
20 in any way. I assume that's understood at a minimum.

21 MR. SCUTERO: Yeah, that's - yes. And the City  
22 was not planning on using those documents, Judge, since  
23 they don't --

24 THE COURT: So what are they going to use --

25 MR. SCUTERO: -- no relevance --

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2 THE COURT: What are they going to use to talk  
3 about the threats? Are they just going to rely on  
4 testimony and what is the testimony based on?

5 MR. SCUTERO: Well, Judge, I don't, I can't say  
6 for sure offhand. The City will be relying on  
7 testimony, and that will be subject of, you know,  
8 depositions that plaintiffs are currently taking. But I  
9 can't say for sure which documents the, that - without  
10 seeing them in front of me, which documents the City  
11 will be relying upon with respect to intelligence. I  
12 can --

13 THE COURT: But it's not these documents  
14 obviously.

15 MR. SCUTERO: Right, that's what I was going to  
16 say, Judge, it's not these documents.

17 THE COURT: But what intelligence documents,  
18 are there intelligence documents that don't reveal  
19 techniques and (indiscernible)?

20 MR. SCUTERO: Well, I believe there would be.  
21 I can't say for sure, Judge, but, generally speaking, I  
22 would say that, yes, there are documents, there are  
23 intelligence documents that could be produced or have  
24 already been produced --

25 THE COURT: Well, I hope they have been

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2 produced --

3 (interposing)

4 MR. SCUTERO: Yes, sorry, Judge, I misspoke.

5 That have been produced that do not reveal techniques  
6 and procedures. It's hard to say --

7 MR. LAMBRIGHT: Your Honor --

8 THE COURT: It's hard to say, you know, with  
9 the documents in front of me, without knowing all the  
10 documents in the universe of documents that have been  
11 produced, whether or not, you know, there are documents  
12 that the City will be relying upon with respect to  
13 intelligence. I can't say that for sure because I don't  
14 have, I don't know the whole universe of documents.  
15 There's been so many that have been produced already.

16 THE COURT: Mr. Lambright, you were saying  
17 something?

18 MR. LAMBRIGHT: Yes, Your Honor, you know, I  
19 just want to flag that we do have a preclusion argument  
20 and that, you know, even if the City's not going to rely  
21 upon these specific documents to make its intelligence  
22 argument, we need to be able to review, you know, it's  
23 unfair for us not to have reviewed these documents and  
24 to challenge, asserting that there were threats against  
25 officer safety and other intelligence related matters

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2 and not to be able to use these in our preparation for  
3 depositions and those (indiscernible) challenge  
4 assertions that are kind of made about threats to  
5 officers' safety and terrorism threats. You know,  
6 obviously there are going to be a lot of assertions  
7 about whether there was actual threats or not, and to be  
8 able to review these documents is kind of essential for  
9 us to be able to say that, you know, one possible threat  
10 was not really credible and to really kind of go and  
11 say, and make our claim and case that the NYPD was  
12 relying upon faulty intelligence to over-police these  
13 protests and to escalate tension resulting in harms to  
14 our clients.

15 MR. SCUTERO: Well, Judge, what I would say is  
16 that, again, we would not be relying on the documents  
17 that are subject to privilege in this case and that  
18 plaintiffs' argument would essentially eviscerate the  
19 privilege if they're saying that because they're making  
20 an argument based on intelligence that then they can,  
21 they should be permitted to view documents relating to  
22 intelligence, that would just completely eviscerate the  
23 privilege. We would not have the ability to assert  
24 privilege at that point. And documents that ordinarily  
25 would be protected would be subject to being disclosed.

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2           So I think it's a broad view of this sword and  
3 shield argument that plaintiffs appear to be taking when  
4 that sword and shield's argument is more narrowly  
5 tailored than I think plaintiffs seem to be suggesting.

6           THE COURT: Well, In re City of New York is a  
7 little equivocal on this. It seemed to be satisfied  
8 with a notion that the (indiscernible) used as a sword,  
9 though it did find in the alternative that even if it  
10 was selectively disclosing reports that they found that  
11 there was other information available through the other  
12 reports, which they called the end user reports.

13           You know, looking at these documents, you know,  
14 the undercover is much more specific than some of the  
15 other ones. The other ones are really just not going to  
16 be useful to the plaintiffs. So it's easy for me to  
17 find that they certainly couldn't form the basis for  
18 preclusion.

19           I think the way we're going to have to leave  
20 this is if in questioning anyone about the basis for  
21 their, you know, policing activities, if they're relying  
22 on some intelligence reports and it's determined that,  
23 in fact, the plaintiffs weren't provided with whatever  
24 that information was, I think that would be the time to  
25 come immediately back to me and see if at that point

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2 there's a basis for getting (indiscernible) preclusion  
3 or something else. So it's not the most efficient way  
4 to do it, but I don't really see any other way to do it.

5 So I'm going to adhere to my rulings on the law  
6 enforcement privilege, and if something comes up in the  
7 future depositions that suggests there's an unfairness,  
8 I'm ready to hear it.

9 All right, let's move on to deliberative  
10 process. And let me, I believe the first - let me just  
11 clear out what I have. Okay, we're going to go back to  
12 the NYPD documents, and I think the first one ends  
13 34920. Mr. Scutero, do you see the document I'm talking  
14 about?

15 MR. SCUTERO: Yes, Judge, I'm pulling it up  
16 now.

17 THE COURT: Just give me a second to --

18 MR. SCUTERO: Yes, Judge, I have it.

19 THE COURT: Okay, so we're - so let me hear  
20 what you have to say about this.

21 MR. SCUTERO: Sure, Judge. It's - as you know,  
22 for a document to be privileged under the deliberative  
23 process, it has to be pre-decisional and deliberative.  
24 In this email exchange, you can clearly see that members  
25 of the police department are suggesting and debating

1 PROCEEDINGS

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2 whether or not a certain tactic should be utilized in  
3 terms of crowd control during the June 2020 protests.

4 THE COURT: Well, let me hear from Mr.

5 Lambright, and then I'll ask questions. Mr. Lambright.

6 MR. LAMBRIGHT: Yes. So, again, this document,  
7 as we said in our letter, appears to be a document  
8 relating to operational, to operations and not kind of  
9 the formation of high level policy. And, therefore,  
10 it's not deliberative in the meaning of the deliberative  
11 process privilege. And, again, we would also make the  
12 argument that it would be overcome by the needs of the  
13 case.

14 THE COURT: So, Mr. Scutero, this is people  
15 talking about practically in real time whether, as you  
16 put it, to use a certain tactic or not. I'm trying to  
17 understand why this is policymaking. Policy in my mind  
18 involves, you know, a judgment about kind of an  
19 overarching in some sense policy. I'm going to use the  
20 Second Circuit term policy oriented judgment. And we  
21 know it doesn't apply to routine operating decisions.  
22 This was certainly a non-routine situation that happened  
23 in 2020, but it's routine in the sense that the idea of  
24 what tactics you're going to use in a given situation,  
25 that's a judgment that is routinely made by the police

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2 department.

3 So tell me why this is policy and not, you  
4 know, just trying to figure out how to police  
5 demonstrations?

6 MR. SCUTERO: Well, Judge, we see the Court's  
7 point that this appears to be relating to a operational  
8 tactic for policing demonstrations, but it, you know, it  
9 concerns using a certain technique that was not used  
10 during the protests and was not used further in the  
11 protests, so it essentially became a policy of the NYPD  
12 to not use that certain tactic when policing the  
13 protests in 2020.

14 THE COURT: Well, now you're saying whether  
15 it's policy or not depends upon whether it's actually  
16 employed. Well, that may be true in the sense that -  
17 well, actually, no, I'm not sure why it matters whether  
18 it's actually used or not used. I think whether  
19 something is, quote, "policy," a "policy oriented  
20 judgment," unquote, to quote the Second Circuit, doesn't  
21 depend upon whether it's used or not.

22 All right, so on this one I don't believe the  
23 deliberative process privilege has been met, and I think  
24 this is operating decision, it's certainly being  
25 discussed at the very highest levels, but just because

1 PROCEEDINGS 39

2 something is brought to the highest level to my mind  
3 does not make it a policy-oriented judgment. So I'm  
4 going to order the production of this document which is  
5 ending 34920.

6 Okay, let's go to our next one. The next one I  
7 believe ended it's DMNL00251\_000242609. And just give  
8 me a moment to remind myself of what this is. Oh, wait,  
9 no, no. I had the number wrong. It's not 42609. Is  
10 that what I just said?

11 MR. SCUTERO: Yes, Judge.

12 THE COURT: I mean 37 - it's the same opening  
13 DMN line but it's, the numbers end 00234771, that's what  
14 I mean. Okay, let me call that up.

15 MR. SCUTERO: I'm pulling it up now, Judge.

16 (pause in proceeding)

17 MR. SCUTERO: Judge, this document, if I have  
18 the right document, it's 234771. Is that correct?

19 THE COURT: Yes.

20 MR. SCUTERO: Okay. This document appears that  
21 the law enforcement privilege would protect this  
22 document.

23 THE COURT: That's not what you marked. Unless  
24 I have it wrong, exhibit A at 2. Can someone check it?

25 MR. LAMBRIGHT: Yes, my, Your Honor, I only see

1	PROCEEDINGS	40
2	deliberative process privilege marked for this document.	
3	THE COURT: You're going to have to justify it	
4	or not on that basis.	
5	MR. SCUTERO: Yes, certainly, Judge. So this	
6	is a document that was submitted to a chief of the NYPD	
7	asking for approval of certain rules with regards to	
8	arrests and how they will be assigned and what type of	
9	approaches concerning violations the NYPD should take.	
10	And it's providing instructions for officers in the	
11	field, proposed instructions for officers in the field	
12	on how they should police certain areas during the	
13	protests and how they should treat the curfew during the	
14	protests.	
15	THE COURT: Okay, I mean I don't think I need	
16	to hear from the plaintiffs. This is just not a policy-	
17	oriented judgment going on here. This is decision about	
18	how to operate, what's going to be done very	
19	specifically with respect to the protests. It's a	
20	operating, what I view as a routine operating decision	
21	on that end of the spectrum, not a policy judgment. We	
22	don't know from this whether it's, you know, enacted or	
23	not, but that doesn't matter, it's just not	
24	deliberative. So I'm ordering production of that one.	
25	That's 34771.	

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2           Okay, let's go now to what I think - okay, I  
3 think the next deliberative process is from the OTM  
4 documents. And it's 16070. Let me just look at this  
5 again to refresh my recollection.

6           (pause in proceeding)

7           THE COURT: Okay, so, Mr. Scutero, what do you  
8 have to say about this one?

9           MR. SCUTERO: So, Judge, this document contains  
10 discussion, questions and answers and discussion related  
11 to a number of policies that were put in place with  
12 respect to the protests, including how the City should  
13 address certain issues like officer discipline and other  
14 issues with respect to the protests.

15           THE COURT: All right, I mean, once again, I  
16 don't see what the policy process is. I see this as  
17 operating, how they're to operate during the course of  
18 the protests. I see questions about things going on  
19 with the officers at the protests. I just don't see a  
20 policy-oriented judgment being made here. And just to  
21 put it in context of the deliberative process privilege,  
22 I can't see that in the future if this sort of  
23 information were released, that this would inhibit  
24 anyone from doing exactly what, asking the questions  
25 that people are asking here about what's going on with

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2 the policing of the protests and the treatments of the  
3 protests. So I'm not finding that there's deliberative  
4 process privilege applicable here. So 16070 is ordered  
5 released.

6 Next is 42258. Tell me what you want to say  
7 about this, Mr. Scutero.

8 (pause in proceeding)

9 MR. SCUTERO: I'm just pulling it up now.

10 (pause in proceeding)

11 MR. SCUTERO: Oh, Judge, this is a document  
12 that is pre-decisional in that you have members of the  
13 Mayor's office discussing what should be, what  
14 information should be disseminated to the public with  
15 respect to certain policies that the City has employed  
16 in policing the protests. It's deliberative because it  
17 relates to these specific policies and, therefore,  
18 should be withheld and protected by the deliberative  
19 process privilege.

20 THE COURT: Okay, I don't need to hear from the  
21 plaintiff again. This is geared towards, you know, what  
22 public statement's going to be made about what is going  
23 on sort of in real time with respect to actions of the  
24 police during the protest. To me this is not a policy-  
25 oriented judgment that people are deliberating about.

1 PROCEEDINGS 43  
2 It's, you know, a routine, it's a matter outside the  
3 scope of policymaking. So I'm going to order 42258  
4 produced.

5 Next is ends in, it's DMNL00303\_000043232.  
6 Anything you want to say about this?

7 MR. SCUTERO: I'm just pulling it up right now,  
8 Judge. Again, considering the Court's rulings on the  
9 last four documents, I would say that this probably  
10 falls into the same category.

11 THE COURT: Okay, you saw the writing on the  
12 wall.

13 MR. SCUTERO: Yes, Judge.

14 THE COURT: Okay, once again, not a policy-  
15 oriented judgment. It's an operational decision about  
16 what to do during the course of the protests. So that's  
17 ordered produced. That's 43232.

18 Okay, next is the document ending 98522. Do  
19 you know what I'm talking about?

20 MR. SCUTERO: I'm pulling it up now, Judge.  
21 Yes, I see it, Judge. This appears to be meeting notes.

22 THE COURT: Okay, I don't even know whose  
23 meeting it is, but go ahead.

24 MR. SCUTERO: No, Judge, I understand, you  
25 know, the Court will likely rule has it has in the last

1 PROCEEDINGS 44  
2 five documents. I will note though there are two points  
3 in the notes that I think relating to discipline that  
4 should be subject to redaction based on DPP because they  
5 appear to propose certain guidelines for --

6 THE COURT: After the word discipline?

7 MR. SCUTERO: Yes, Judge.

8 THE COURT: And the second one with discipline?

9 MR. SCUTERO: Yes, Judge.

10 THE COURT: So you're saying even if the others  
11 are deliberative process, you think those two are?

12 MR. SCUTERO: I think those two are, yes,  
13 Judge.

14 THE COURT: Let me look at them again. Before  
15 you start, let me just look at them more specifically.

16 (pause in proceeding)

17 THE COURT: All right, go ahead.

18 MR. SCUTERO: Judge, I would say with regards  
19 to the first one, you have a suggestion on, an advice on  
20 how discipline and misconduct should be treated by the  
21 police department. The defendants would argue that  
22 because of that this information is certainly pre-  
23 decisional because a decision has not been since it's a  
24 recommendation. And that is deliberative because it's  
25 in the formulation of formulating policy with respect to

1 PROCEEDINGS

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2 disciplining of officers. And so for those reasons it  
3 should be redacted under DPP.

4 With respect to the second one, Judge, I'm just  
5 looking at that now and don't believe that one would be  
6 subject to redaction.

7 THE COURT: Okay, so on the two that you just  
8 said should be, why don't you address need.

9 MR. SCUTERO: Is that for defendants or  
10 plaintiffs, Judge?

11 THE COURT: No, for you.

12 MR. SCUTERO: For me.

13 THE COURT: Tell me why there isn't a need. I  
14 mean if you want to hear their need argument, I'm happy  
15 to - it's just a little hard for them to do it given  
16 they can't see what it is.

17 MR. SCUTERO: Right. Well, Judge --

18 THE COURT: You might as well go first.

19 MR. SCUTERO: Sure. Sure, Judge. I don't  
20 believe that there's a need for this information because  
21 certainly the plaintiffs can obtain this information  
22 from other sources, either through --

23 THE COURT: Wait, wait, wait. They contain  
24 information about what was being discussed in terms of a  
25 proposal?

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2 MR. SCUTERO: Well, they could obtain not  
3 necessarily the proposal but what the actual policy with  
4 respect to discipline was at the time. That information  
5 that they could obtain and that's the information that's  
6 relevant to their case. Not information of what was  
7 being debated by the NYPD in terms of how they should  
8 discipline officers during the protests.

9 THE COURT: All right, Mr. Lambright.

10 MR. LAMBRIGHT: Yeah, so I have two points in  
11 response to that. First, again, it's hard to kind of  
12 know about seeing what we're discussing, but, first, I  
13 would just say that general kind of thoughts and ideas  
14 or concerns which defendants say about kind of generally  
15 how they discipline officers does not meet the kind of  
16 standards of the deliberative process privilege in that  
17 there has to be kind of a specific policy that  
18 (indiscernible) idea or discussion kind of aligned with.  
19 This kind of amorphous kind of generally talking about,  
20 you know, how to discipline officers doesn't just meet  
21 that standard.

22 And then my second point as to need is that,  
23 you know, obviously we have Monell theory against the  
24 City and one of the possible theories as to how one  
25 develops the Monell claim is failure to discipline. And

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2 if this goes to, you know, if this provides relevant  
3 information about failure to discipline, excuse me, then  
4 the need is overcome. Additionally, there are questions  
5 about what decisionmaker, whether a higher level  
6 decisionmaker is aware of and whether a higher level  
7 decisionmaker ratifies, and all of those issues are kind  
8 of relevant when kind of addressing whether the  
9 privilege is overcome. It's not just narrowly an issue  
10 of kind of looking at disciplinary policy as it's  
11 written.

12 THE COURT: All right. I'm going to find this  
13 is not protected by deliberative process privilege,  
14 thinking specifically of the Grand Central Partnership  
15 case, 166 F.3d at 682. Privilege does not protect a  
16 document which is merely peripheral to actual policy  
17 formation. And in order to apply the privilege, the  
18 document has to form an essential link in a specified,  
19 consultative process. And this is just too amorphous,  
20 you know, it's completely unknown who did this as part  
21 of what process. That specificity is just not gleanable  
22 from the document and certainly hasn't been provided in  
23 any other way. So I'm finding this document is not  
24 protected by deliberative process privilege.

25

Mr. Scutero, I note this is one of the

1 PROCEEDINGS 48  
2 documents that said attorney-client. So are you giving  
3 up on that or do you want to tell me what the issue is?

4 MR. SCUTERO: Judge, I don't see --

5 THE COURT: I suspect it's the second line  
6 there.

7 MR. SCUTERO: Yes --

8 (interposing)

9 THE COURT: But that's not enough.

10 MR. SCUTERO: No, I agree, Judge. I don't see  
11 how there would be, how this would be privilege under  
12 attorney-client privilege.

13 THE COURT: All right, so 198522 is ordered  
14 produced. I think we have two more in the sample.  
15 13061, give me a second just to remind myself what this  
16 is.

17 (pause in proceeding)

18 THE COURT: I remember, and I think you'll  
19 probably guess, Mr. Scutero, that it's of the same ilk  
20 as the other decisions. But if you think there's  
21 something different about it, tell me.

22 MR. SCUTERO: Yeah, I think that's right,  
23 Judge. I just want to look at the entire document if  
24 you just give me a moment.

25 THE COURT: Take your time.

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MR. SCUTERO: Thank you.

3

(pause in proceeding)

4

MR. SCUTERO: Judge, my concern with this document, not necessarily the exchanges at the top of the document but further down, the email exchange that took place on June 1 at 5:38 p.m.

8

THE COURT: Hold on. Let me look at that part.

9

(pause in proceeding)

10

THE COURT: Go ahead.

11

MR. SCUTERO: Judge, obviously, here you have members of the Mayor's office discussing the curfew, and you have advisors expressing, you know, their opinions about certain aspects of the curfew. And so those would certainly be pre-decisional and deliberative as the curfew was a, you know, a specific policy that was imposed by the City. With that in mind, that these, this conversation would fall under deliberative process privilege, and I don't see how plaintiffs have a need for this specific conversation. Again, the curfew is the policy that is put in place, and the deliberations that took place aren't relevant to the plaintiffs' Monell claims. It's actually the curfew in and of itself that is relevant to the plaintiffs' claims.

25

And so how we get to the policy of the curfew

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2 doesn't provide much with respect to the plaintiffs  
3 having to prove those claims. We know the curfew is in  
4 place. Their claims relate to how that curfew was  
5 imposed and whether or not officers enforced that curfew  
6 properly. So the decision leading up to the curfew or  
7 the deliberations I should say and the discussions  
8 leading up to the curfew the plaintiffs do not have a  
9 significant or compelling need for. So I would - the  
10 defendants argue that this particular email conversation  
11 starting at, on June 1 at 5:38 p.m. should be redacted  
12 from this, from the document.

13 THE COURT: There's three people mentioned.

14 Who are they? Do you know?

15 MR. SCUTERO: Within the body or the people who  
16 are conversing in the to and from lines?

17 THE COURT: No, no, in the body.

18 MR. SCUTERO: In the body. I do not know,  
19 Judge.

20 THE COURT: Mr. Lambright.

21 MR. LAMBRIGHT: I would say that opinions about  
22 - again, it's hard to comment on this without seeing  
23 what's being referenced - but opinions about an ongoing  
24 curfew would probably be too attenuated, the to/from  
25 policy oriented judgment to constitute, to rightly

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2 invoke the deliberative process privilege.

3 Additionally, going to the needs of the case, it is not  
4 merely - we're not seeking anything kind of generally  
5 about the formulation of the curfew order. What we are  
6 seeking is information about how the curfew was  
7 interpreted and enforced after it was put in place, and  
8 that directly goes to our claims. We have plenty of -  
9 we know the policy on the books. However, we have  
10 plenty of documentation showing that the policy was not,  
11 that the policy was not being enforced against everyone,  
12 and it was only being enforced against some people, and  
13 we need to kind of understand why there were kind of  
14 disparities in enforcement.

15 (pause in proceeding)

16 THE COURT: All right, look, my problem right  
17 now is I don't know who these people are. I don't know  
18 how it relates to a chain of, you know, decision-making.  
19 I mean that piece of it is just missing here. Look, I'm  
20 going to order this produced. I'll give you a chance to  
21 redact this part, if you want to make a separate  
22 application immediately to explain who these people are  
23 and why it's part of some, you know, definable process  
24 for formulating policy.

25 And let me give an alternative here. If you

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2 want to protect these people's names, you could redacted  
3 them, and you have the names be for attorney's eyes only  
4 so at least they know who they're dealing with. So  
5 either produce the whole thing or produce it with an  
6 attorney's eyes only redaction of the names, that's one  
7 option. The other option is to produce everything but  
8 the 5:38 email and make an immediate application to me  
9 with an affidavit from someone who's explaining who  
10 these people are and what the process was.

11 MR. SCUTERO: Understood, Judge, thank you.

12 THE COURT: Do you understand, Mr. Scutero?

13 Okay.

14 MR. SCUTERO: Yes, understood.

15 THE COURT: So that was 13061. And maybe I  
16 should just make clear, in terms of need, I think, I  
17 can't even think about that without knowing who these  
18 people are. There could be zero need for this depending  
19 upon who they are and what the process was. So I can't  
20 think about that, you know, with the information I have  
21 or rather I can't rule on it.

22 Okay, the last one in our sample ends 13266.

23 Is that enough for everyone or should I give the full  
24 number?

25 MR. SCUTERO: No, I have it, Judge.

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THE COURT: Mr. Lambright, do you know what  
we're talking about?

4

MR. LAMBRIGHT: Yes, Your Honor.

5

6

THE COURT: Okay, give me a second just to look  
at it.

7

(pause in proceeding)

8

THE COURT: All right, this seems of a piece  
with the ones earlier that I ordered to produce, people  
talking on the spot about what to do and what's going  
on. So is there anything else you want to add, Mr.  
Scutero?

13

MR. SCUTERO: No, Judge.

14

THE COURT: Okay, so I'm going to make a ruling  
that those are produced.

16

Okay, so, you know, here's where we ended up.  
We ended up with all the law enforcement privilege being  
upheld and virtually none of the deliberative process  
being upheld. So what that says to me is the City  
should go back and presumably produce all their  
deliberative process withheld material unless they think  
they can make a case that there's something very  
different about it and do that very quickly. Mr.  
Lambright, do you have any ideas about how to do this?

25

MR. LAMBRIGHT: I mean I would just suggest

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2 that they produce the documents, you know, as quickly as  
3 possible.

4 THE COURT: Yeah, I mean theoretically I  
5 suppose I could just, you know, go over the remaining  
6 hundred or two hundred or whatever it is documents. I  
7 don't particularly relish doing that. So I'd like the  
8 City to make some effort to spare me that and do it  
9 quickly, and then if they say, no, we think these are  
10 all different, you're going to have to go through them  
11 all again, then that's what I'll do, I'll go through  
12 them all.

13 MR. SCUTERO: Judge, I'd just ask if the City  
14 could have some time to cull through the documents and  
15 look to make sure that these documents fall underneath  
16 the reasons and, the reasons why the Court produced or  
17 ordered the production of the deliberative process  
18 documents in the sample. So --

19 THE COURT: Okay, so, Mr. Scutero, you were  
20 really quick I thought in looking at the ones we looked  
21 at today. I know the conference took a long time, but  
22 that was mostly me talking and thinking. You seemed to  
23 go through them in a couple of minutes. So with that in  
24 mind, how much time are you, thought you needed to do  
25 it?

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2 MR. SCUTERO: Well, there are considerably many  
3 more documents at issue, Judge, so I was hoping that we  
4 could get two weeks.

5 THE COURT: I think I need you - the problem is  
6 the depositions are now, you know, in full swing, I  
7 hope, and I just don't, I think two weeks is too much.  
8 I'll give you a week, Mr. Scutero.

9 MR. SCUTERO: Thank you, Judge.

10 THE COURT: So let's say a week from today,  
11 that's the 20<sup>th</sup>. You know, it's a holiday, so you get a  
12 break for a day, February 21.

13 MR. SCUTERO: Right, thank you, Judge.

14 THE COURT: So what I'm hoping to get from you,  
15 well, my fantasy is you don't have to look at any  
16 documents, Judge, we're just producing them all.  
17 They're governed by your prior ruling. And then the  
18 next possibility is here's the list of documents we've  
19 produced, don't worry about those, and here's the ones  
20 we're still asserting the privilege, and then I'll deal  
21 with those.

22 MR. SCUTERO: Understood.

23 THE COURT: Okay. You know, for law  
24 enforcement privilege, I feel like it's the, you know,  
25 the most likely ones chosen by the plaintiffs didn't

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2 make it and some of them are of, you know, a category.  
3 I think there's multiple. I'm not sure there's any  
4 utility in my doing anything further, but I'm willing to  
5 hear from you, Mr. Lambright.

6 MR. LAMBRIGHT: I mean if we could also review  
7 and, you know, I think given your, the ruling on the law  
8 enforcement privilege, also have a time and, you know,  
9 just given how you ruled, if we can identify some  
10 documents that we think should be turned over, if we  
11 could provide that list to you maybe around the same  
12 time as the defendants provide the DP list. I think  
13 that - I would suggest that.

14 THE COURT: Okay, that's fine, in a week.  
15 Hopefully, you'll be conservative in your request. But  
16 I leave it to you to make that decision. You'll give me  
17 a list of Bates numbers.

18 MR. LAMBRIGHT: Yes. Yes, Your Honor.

19 MR. SCUTERO: Judge, is there any way - Judge,  
20 is there any way we could maybe limit that like you did  
21 with the sample? I think you limited the sample to ten  
22 to twenty documents. I think that would be a good way  
23 going forward especially for Your Honor, given the  
24 number of documents --

25 THE COURT: Well, I'm very appreciative of your

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2 valuing my time. I think it doesn't really affect you  
3 all that much. Certainly, I'm hoping it's not more than  
4 ten. I don't think I want to put a numerical limitation  
5 on it. I mean I didn't limit you as to how many  
6 deliberative process documents you could require to be  
7 presented to me. So I think I just have to rely on  
8 people's good faith at this point. If it's too much,  
9 then I can always say, you know what, it's too much,  
10 let's try another sample and see how that goes.

11 MR. SCUTERO: Understood, thank you, Judge.

12 MR. LAMBRIGHT: Thank you.

13 THE COURT: Okay. I think we're done on this,  
14 and I'm ready to turn to the other one, but only just  
15 check with Mr. Lambright, anything further on this one?

16 MR. LAMBRIGHT: No, Your Honor.

17 THE COURT: Mr. Scutero, anything further?

18 MR. SCUTERO: No, Judge.

19 THE COURT: Okay, I'm sorry, who's going to go  
20 for the City on 680?

21 MR. SCUTERO: On the after-action review,  
22 Judge, that would be me.

23 THE COURT: Okay, and for the plaintiffs?

24 MS. STOUGHTON: Your Honor, it's Corey  
25 Stoughton.

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THE COURT: Okay. We're going to take a two-minute break, so just stay where you are, maybe on mute, and I'll be back with you in a minute. Okay?

5

(pause in proceeding)

6

THE COURT: Ms. Stoughton, is that you?

7

MS. STOUGHTON: I'm sorry, Your Honor, this is Ms. Stoughton.

9

THE COURT: Okay, no problem. Mr. Scutero, you're ready?

11

MR. SCUTERO: Yes, Judge.

12

THE COURT: Okay. Hopefully, this won't be as lengthy as the other, and I don't expect to be making oral ruling. This is really just have some questions.

15

Let me organize my notes. I guess one question I have for defendants to start with, which is I thought there was some implication that the plaintiffs have already given factual material underlying the draft after-action report and, you know, the (indiscernible) documents. I mean I'm trying to figure out if there's any way for me to determine that from anything, certainly nothing I have, and you know, I'm really jumping to segregability here.

24

But, you know, there's a couple charts here, page 10. There's a timeline that is, you know, I have

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2 to look a little more carefully. I think it's largely  
3 factual. I don't think it shows a lot of deliberation.  
4 I mean and there's page 15, 16, you know, those charts  
5 scattered throughout here. Assuming deliberative  
6 process were found to apply, why wouldn't at least those  
7 charts and those numerical listings be segregable?

8 MR. SCUTERO: Well, Judge, purely --

9 THE COURT: And I know the legal argument, oh,  
10 well, it shows you what they're thinking about, but some  
11 of it is just so obvious, you know, I don't think I'm  
12 giving anything away if I talk about number of arrests,  
13 things like that. That, you know, you can't seriously  
14 say that those charts show something about a policy  
15 deliberation. Sorry if I cut you off if that was going  
16 to be your answer and now you have to come up with  
17 something else.

18 MR. SCUTERO: No, Judge, that was going to be  
19 my answer that, you know, factual information isn't  
20 always segregable because it does show the decision-  
21 making process of the agency. But if the Court believes  
22 that that information, that factual information in the  
23 charts that you pointed out is segregable and does not  
24 actually reveal the agency's process, then we would  
25 defer to the Court's, obviously defer to the Court's

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2 decision on that.

3 THE COURT: All right, now here's a completely  
4 different question, and this goes more to need again.5 I'm skipping over actual privilege for the moment. What  
6 is it - in your briefing you say, oh, well, they're  
7 going to get testimony; they don't need this. Why kind  
8 of testimony do you think they're going to get that  
9 replaces this? And if I've been accurately  
10 characterizing what you said, tell me. I'll try to find  
11 it.12 MR. SCUTERO: No, Judge, you did accurately  
13 characterize it. Yes, we did mention that as an  
14 alternative plaintiffs would be able to receive  
15 testimony from individuals who were part of the after-  
16 action review. Certainly, I believe Conforti is on the  
17 deposition list. I'm not exactly certain --

18 THE COURT: But what are they --

19 (interposing)

20 MR. SCUTERO: -- plaintiff might be able to  
21 correct me.22 THE COURT: But what are they going to get  
23 testimony on? Are they going to get testimony on the  
24 substance of the report or on the process of the report  
25 of the review coming into existence and it not being an

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2 issue.

3 MR. SCUTERO: Well, that's a good question,  
4 Judge. Obviously, those would be protected, those two  
5 issues would be protected under deliberative process  
6 privilege as well.

7 THE COURT: Well, hold on, hold on, hold on.

8 The first one much more obviously than the second one.  
9 I'm not sure why the second one is. The process - the  
10 process of creating the after-action review is not by  
11 itself a policy.

12 MR. SCUTERO: But is --

13 THE COURT: That - go ahead.

14 MR. SCUTERO: Sorry, Judge. My understanding  
15 of the case law on deliberative process is that the  
16 actual process of making the decision is protected under  
17 deliberative process and that's one of the reasons why  
18 fact --

19 (interposing)

20 THE COURT: Hold on, hold on, hold on. I don't  
21 know what you mean by the word process. And maybe we're  
22 getting too meta here, if that's the right word. But  
23 when five people in the policy department at the agency  
24 get around and say, oh, what's going to be our policy  
25 on, and let's pick something that's not in this report,

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2 you know, the number of officers to put in a police car  
3 going out to a protest, should it be two or should it be  
4 three? Their discussions about whether it should be two  
5 or it should be three and what they said about it and  
6 why one's better than the other, that's definitely part  
7 of the policy process and policy-making process and  
8 could easily be part of the deliberative process.

9                 The fact that people met on something that's  
10 now known, which was there's an actual after-action, the  
11 fact that there was - I mean is it all completely out  
12 anyway? It's in the affidavit. You gave an affidavit  
13 on the topic which is, you know, that I was asked to  
14 prepare a report, I did this, I did that, and then I  
15 didn't do anything about it. The notion you could say  
16 that I don't know what you meant by process, but that's  
17 what I meant by process, and that's obviously something  
18 you're going to have to give testimony on. Right?

19                 MR. SCUTERO: I suppose that's correct, Judge.

20                 THE COURT: Yeah. So, again, we need to  
21 distinguish between the actual judgments that were being  
22 bandied back and forth, the substance, whether it's two  
23 or three police officers in the patrol car, and the, you  
24 know, what I call a process of putting this report  
25 together.

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2 So my question was really about the first thing  
3 because I thought it was obvious that you were going to  
4 give testimony about this structural process. Are you  
5 going to give testimony about the recommendations and  
6 what was considered and what was rejected and so forth?

7 MR. SCUTERO: The actual substance of what was  
8 considered and what was recommended?

9 THE COURT: Yes.

10 MR. SCUTERO: No, that would be protected under  
11 deliberative process, Judge.

12 THE COURT: Okay, so when you said in your  
13 brief that they were going to get testimony, what is it  
14 you were referring to?

15 MR. SCUTERO: Well, it certainly would not be  
16 the actual substance of the report or those documents  
17 and conversations and discussions that went into the  
18 report. It would involve, as you say, the process of  
19 how the report was done, how it came about, who actually  
20 met about the report, things that have already been  
21 provided on the declarations that we submitted to the  
22 Court, that's all information that could possibly be  
23 questioned during deposition.

24 THE COURT: Okay, so you can imagine it's cold  
25 comfort to them for you to respond to their argument

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2 that they have a substantial need for this by saying,  
3 oh, don't, you know, for the substance of this by  
4 saying, oh, don't worry, you're going to get testimony,  
5 because you're not talking about testimony about the  
6 substance. Do you see the problem?

7 MR. SCUTERO: Yes, I do, Judge.

8 THE COURT: Okay. I want to clear that up.  
9 And I think the rest of my questions are for the  
10 plaintiffs. So I'm not sure, I'm happy to hear from you  
11 about the substance of the deliberative process, but I  
12 thought your stronger argument was about need. But if  
13 there's something you want to say about substance since  
14 we're all here, Ms. Stoughton, I'm happy to hear from  
15 you.

16 MS. STOUGHTON: No --

17 THE COURT: But if you don't, if you don't, I  
18 want to have some questions on need.

19 MS. STOUGHTON: I'm happy to focus on the need  
20 issue.

21 THE COURT: Okay. So here's the problem.  
22 You're going to get information from Conforti, you've  
23 already gotten it, or from some other person about how  
24 this after-action process was put into effect, they were  
25 asked to do it, they went through all this effort, and

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2 then the whole thing fizzled out and they didn't do a  
3 report. So you're going to have all the information you  
4 need about what I call the process. Tell me why the  
5 substance, why you need the substance of this for your  
6 case.

7 MS. STOUGHTON: Your Honor, two things. First,  
8 and I'm sure Your Honor would have seen this but just to  
9 connect up the dots, in the letter regarding depositions  
10 that the defendants just filed which is at ECF 841, the  
11 defendants have moved to preclude the deposition of  
12 Chief Conforti on the grounds that they assert, and I'm  
13 quoting from the letter, "an end run around assertion,"  
14 their assertion of the privilege. So I think that's  
15 worth saying off the top.

16 THE COURT: Okay --

17 MS. STOUGHTON: Second --

18 THE COURT: -- but I think we now - hold on,  
19 just to be, the record's clear. I think we've had a  
20 concession, and if not we can come back to it, that the  
21 process of doing this, whether it's Conforti or someone  
22 else, is not going to be hidden. So keep going.

23 MS. STOUGHTON: Okay. The second thing to say  
24 is just all of our experience, we've been litigating a  
25 long time, that witnesses' memories fade over time. So

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2 it may be that Chief Conforti remembers every detail of  
3 how the process unfolded and then fizzled out, but it's  
4 very likely that he does not. And in those situations,  
5 having documents to refresh the witness' recollection,  
6 to focus the witness' memory, and to fill in the gaps  
7 where that memory can't be refreshed is important. And  
8 that is the primary concern in withholding all of these  
9 documents without having any documentary record to give  
10 a sense of shape to this critical process.

11 THE COURT: Okay, so I'm just trying to think  
12 technically. I think - I don't know if it's Conforti,  
13 but I mean I assume this is a 30(b)(6) topic. Maybe it  
14 isn't. But it would be their responsibility to prepare  
15 someone as to the process. So I'm not sure that the  
16 answer is wholesale production of - and, by the way, the  
17 report itself is not terribly indicative of the process.  
18 The other, you know, perhaps - I didn't really focus as  
19 much on the other documents. Maybe the other documents  
20 give a little bit of indication of that - actually, I  
21 remember them now. Some of them do.

22 But I mean is that - so you're - you're going  
23 to be - it sounds like you're going to get what you need  
24 if you find out that the, putting aside the substance of  
25 the recommendations. You'll pretend, you know, one of

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2 the recommendations is three police officers versus two  
3 police officers in a car. Your issue is not getting the  
4 fact that that was a recommendation that was out there,  
5 but the fact that they did not actually conduct, did not  
6 actually kind of implement this after-action review and  
7 have it distributed out to the NYPD.

8 MS. STOUGHTON: The only one of the issues.  
9 Yeah, and that, of course, in and of itself is a final,  
10 the decision not to circulate the report or adopt the  
11 report is, of course, a final decision. So that  
12 deliberative, deliberations about that fact shouldn't be  
13 privileged. So to the extent that the documents, and  
14 we'd have no way of knowing that from the privilege log,  
15 but to the extent that the documents that we're debating  
16 here reveal those discussions, those discussions  
17 themselves are not privileged and they're very relevant  
18 because, again, going back to the need argument, one of  
19 the claims that plaintiffs have made drawing on  
20 conclusions reached in the law department's, Corporation  
21 Counsel's own review of the protests, is that the NYPD  
22 systemically failed to follow through in these kinds of  
23 reviews and learned lessons of past misconduct at  
24 protests.

25 THE COURT: Okay, but you're going to get that.

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2 You're going to get that they conducted a review and  
3 then failed to do anything with it or distribute it to  
4 anyone. You're going to get all the information on  
5 that. Why do you need the substance of three police  
6 officers versus two police officers being one of the 25  
7 recommendations?

8 MS. STOUGHTON: I think - I'm not sure that  
9 we're as confident as you are that we are going to get  
10 that information, just again because we can't really  
11 know until the deposition happens, we don't know what  
12 the witnesses know or don't know about that decision, or  
13 what they remember and don't remember about those  
14 decisions. So it's just always been our experience that  
15 deposition testimony is never a full substitute for  
16 getting a look into a documentary record of that  
17 process.

18 The quality of this, of the decision-making  
19 around the process, which is itself not deliberative  
20 because it's not pre-decisional, is really relevant to  
21 our claim. So getting a sense of the quality and nature  
22 of that decision-making is important. And if we had all  
23 the, complete confidence that deposition testimony would  
24 completely duplicate what those documents reveal, that  
25 would be one thing, but I just don't know, I don't see

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2 any basis, we don't see any basis for being sure about  
3 that conclusion. And given how central this issue is to  
4 our theory of the case and building plaintiffs' case for  
5 liability, taking that chance, you know, is - that's why  
6 the need exception exists to this qualified privilege.

7 THE COURT: Okay, but to the extent that I'm  
8 accepting that you have that need, the report, again,  
9 this is my question, the report - maybe some of these  
10 later emails are what we're talking about. I was more  
11 mentally focused on the report itself. The report  
12 itself, which, again, has whatever recommendations it  
13 has, again, one of the ones it doesn't have that I'm  
14 giving as a hypothetical, three police officers versus  
15 two police officers, that doesn't go to that. That  
16 doesn't have anything to do with this. That doesn't  
17 have anything to do with the process. Right?

18 MS. STOUGHTON: I mean I'd have to take your  
19 word for it because we haven't seen the document, but I  
20 can understand how that would be the case.

21 THE COURT: Okay. Let me just look at my other  
22 notes here.

23 (pause in proceeding)

24 THE COURT: Let me just --

25 MS. STOUGHTON: Your Honor, I didn't want to

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2 interrupt your thought process, but before we move on --

3 THE COURT: Go ahead.

4 MS. STOUGHTON: -- to a different thing.

5 THE COURT: Yep.

6 MS. STOUGHTON: You know, again, just to play  
7 this - I know you're not going to rule today, but if you  
8 are considering not ordering the production of the  
9 documents, you know, one question that I would have is  
10 whether the documents - again, I'm very concerned about,  
11 and this is based both on experience in other cases but  
12 also on our one experience with a 30(b)(6) witness so  
13 far. And I'll just point out that Conforti I think is  
14 not a 30(b)(6) witness, a fact witness, but serving the  
15 same sort of function here, testifying as to this  
16 process. And based on that experience we are  
17 anticipating that the witness will have various times  
18 when the witness' recollection needs to be refreshed.  
19 And I think the challenge arises in not having these  
20 documents available to use for that purpose. And if  
21 there's an alternative way to ensure that the witnesses  
22 were ordered to be prepared on this topic with  
23 documents, that would I think perhaps not fully solve  
24 the problem but go some way toward ensuring that the  
25 depositions did serve as an adequate substitute.

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2 THE COURT: I'm sorry, what was the proposal at  
3 the end, that what happened?

4 MS. STOUGHTON: Well, if the documents, if the,  
5 well, look, here's the problem. I'm not sure what I'm  
6 proposing here but I'm trying to brainstorm a solution.  
7 Our concern is that we have had the experience already  
8 with a 30(b)(6) witness in this case where the witness  
9 was, in fact, not prepared to testify to certain topics.  
10 And so we are concerned that Chief Conforti, you know,  
11 he's not even a 30(b)(6) witness, he's a fact witness,  
12 and if his memory is not refreshed in some way as to  
13 this process, it will not come into a deposition which  
14 is really refreshed. And if there were a way to ensure  
15 that he was fully prepared with the documents that we  
16 might not have access to at least to be prepared to  
17 testify as to the details of the process of creating the  
18 report and the decision not to proceed with it, you  
19 know, that could help. I mean, again, I don't know what  
20 that would look like because I never, I've never been in  
21 a case where the defendants (indiscernible) to prepare  
22 their witness in a particular way.

23 I say this more to highlight the issue, a  
24 particular concern that we have about not having those  
25 documents available to refresh his recollection.

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2 THE COURT: Okay, well, I think the City should  
3 understand, and I'm sure Mr. Scutero will agree with me,  
4 that whoever is prepared to testify about the after-  
5 action review process has to be fully prepared and may  
6 need to use deliberative process documents, protected  
7 documents in order to refresh their recollection or even  
8 to educate themselves perhaps to some degree. So there  
9 has to be full preparation. If it didn't happen, then  
10 it would have to happen all over again if it was  
11 understood that there were documents that they hadn't  
12 bothered to look at.

13 So perhaps that takes us a little bit of the  
14 way you were looking for us to go, Ms. Stoughton, is  
15 that fair?

16 MS. STOUGHTON: I think it would if it all  
17 plays out as you just anticipated. I'd say the concern  
18 would be if it doesn't, then especially given all the  
19 time pressure we're all under, that feels like, you  
20 know, not the most efficient way to approach this, and  
21 having the documents would be much more efficient.

22 THE COURT: Right. Yeah, the other documents  
23 that have been withheld, not many of them actually go to  
24 process, I'm now looking at them. They're more like  
25 little subsections of the report or a new draft of the

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2 report. You know, none of it really is I would call,  
3 almost none of it, I'm just going through them one by  
4 one now. They're all like draft sections of the report  
5 or is like a PowerPoint version or a mini version of the  
6 report, edits another report. Yeah, there's really  
7 almost nothing, except for the very last document. Let  
8 me see what you have on that --

9 MS. STOUGHTON: Is that document 32?

10 THE COURT: No, it's - yes, document 32 from  
11 Andrews to Conforti. That's the only one that fits into  
12 that process, I'm sorry, into that category. So let me  
13 now, having heard from you, let me think about that and  
14 see if there's any piece of this.

15 (pause in proceeding)

16 THE COURT: Yeah, some of it - there's a tiny  
17 bit of substance in this. Yeah --

18 (interposing)

19 MS. STOUGHTON: Your Honor --

20 THE COURT: -- it has some substance.

21 MS. STOUGHTON: -- can I just make a point  
22 linking up the draft report and the process which is  
23 this, that, you know, it's - as Your Honor knows because  
24 you've been discussing it today, the case law suggesting  
25 that there's a link between the facts an agency or

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2 government official review and the process kind of is,  
3 the flip side of that coin is that that information can  
4 be relevant when there's a need argument, when the  
5 process is at issue. I think one of the things that we  
6 think is critical about getting some window into the  
7 draft report is that we don't have, again, putting the  
8 deposition question aside, any other way to understand  
9 what it is that the NYPD thought it was important to  
10 look at after the 2020 protests. What did they chose  
11 and not chose to focus on and examine? And I don't  
12 think we have any real way of getting a full and robust  
13 answer to that without knowing what kinds of, you know,  
14 what are the subject, what are the headers of the draft  
15 report, what are the subject matter areas that they were  
16 looking into and not looking into and what's missing  
17 from that.

18           And so I'd say that to say that in addition to  
19 whatever portion of documents you're looking at, I do  
20 think that bigger picture - and that doesn't mean every  
21 document. I mean I recognize what you're saying about  
22 some of these are just fragments, and just being  
23 perfectly frank, I think the list of documents that we  
24 moved on were move of a group. I'm sure it's probably  
25 true that we could get the picture without every single

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2 one of those fragments. It's just drawing a distinction  
3 between us moving on one of them and not the other is  
4 like we couldn't draw a sensible line there.

5                 But that's the point I wanted to make is that  
6 that - just to take one step backwards, it is based on  
7 the documents we reviewed and what Chief Conforti has  
8 said in his affirmations in support of this, it seems  
9 that there is no standard process for these after-action  
10 reviews. So the only way to understand what kind of  
11 process is used is to look at this process, and, again,  
12 that's not an interest in looking at what were the draft  
13 recommendations, was it two officers in a car, three  
14 officers in a car, but more the shape of it. And we  
15 don't really have a window into that unless we get some  
16 window into these drafts.

17                 THE COURT: Okay, so now we've expanded from  
18 where we were before, and that's fine, but I now need to  
19 think about this new argument. I mean new in a sense of  
20 new just now, not that it wasn't observed in your  
21 papers. So the thought is that you need to see whether  
22 they were making recommendations about the number of  
23 people in police cars in order to judge whether this  
24 was, making some judgment about the sort of efficacy,  
25 potential efficacy of the after-action report. Try

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2 connecting it up with me again.

3 MS. STOUGHTON: I think that was well said.

4 THE COURT: I'm just making that up. Okay, go  
5 ahead.

6 MS. STOUGHTON: I thought you put it very well.  
7 The question of what issues, challenges they looked at  
8 and didn't look at speaks to the efficacy of their  
9 after-action review process. And, again, as many  
10 reviewers, including Corporation Counsel, the Department  
11 of Investigation, have noted, and as, you know, as our  
12 experts will note, that kind of reflection of a review  
13 process is, should be part of any competent police  
14 department's approach to these issues. And so getting a  
15 sense of what that process is and how good or bad the  
16 NYPD is at it is central to our Monell claim because of  
17 the claim that this is a repeated pattern of failing to  
18 draw those lessons and learn those lessons.

19 THE COURT: Mr. Scutero.

20 MR. SCUTERO: Well, Judge, it's defendants'  
21 position that, you know, again, going back to what the  
22 Court had already set out was that the after-action  
23 review process is something that they can look into, but  
24 the actual substance of that information does not  
25 actually go to their Monell claims because, again, there

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2 is already decisions made and policies put in place that  
3 is relevant to their Monell claims, not actual policies  
4 that were not put in place. And some of these  
5 recommendations that Conforti has in his report were  
6 adopted by the NYPD.

7 They're able to, they should be able to get the  
8 information that they're seeking about the after-action  
9 review process through deposition and not through the  
10 actual substance of this report. This report, it's  
11 about discrete issues --

12 THE COURT: They're saying, I mean just to  
13 focus you. Forget the first half of our conversation  
14 about this because it turns out they want more than just  
15 the process. Let me put it this way, they want more  
16 than just the, you know, technical, you know, who  
17 proposed to whom and what date and who killed it and so  
18 forth. They want to have the actual information in the  
19 report or the minimum the topics that were looked at I  
20 guess so that they can get up and say, you know what,  
21 this after-action report that, I guess, maybe, Ms.  
22 Stoughton, maybe I need you to correct me. You can get  
23 up and say, oh, I mean it seems to me like it's enough  
24 to know that they did not disseminate this in this form  
25 to the police department. I assume that you'll find out

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2 about changes in policy if there were any and they're  
3 certainly not reflected in this report, that doesn't  
4 give any information about what ultimately happened  
5 later, assuming it's even relevant.

6           But I guess, Ms. Stoughton, let me just turn  
7 back to you, I'm trying to see why it adds anything for  
8 you to say, you know, they - I mean I'm just trying to  
9 imagine what this looks like. You have an expert get up  
10 and testify they looked at putting in three police  
11 officers but not two police officers, and that's not  
12 part of a good after-action review. And then I say to  
13 myself, well, who the hell cares. They didn't issue  
14 this report anyway. I mean that seems to get you all  
15 the way to home base. They didn't issue this out to the  
16 police commanders. Who cares whether they looked at one  
17 thing or fifty things?

18           MS. STOUGHTON: Well, except that I think the  
19 reason that Chief Conforti and others and counsel's  
20 represented that the reason that they didn't adopt it is  
21 because they sought, that the recommendations in other  
22 reports like Corporation Counsel's or the DOI's report  
23 were better or sufficed or something of that nature.  
24 And so we do know I think through that and through other  
25 discovery what changes they did and didn't adopt. But

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2 that still leaves open the question of what was the  
3 NYPD's own process for learning those mistakes because  
4 that is relevant. I mean it just so happens that in  
5 this particular instance a lot of outside agencies,  
6 independent agencies or quasi-independent agencies also  
7 reviewed things. But what is really relevant is what is  
8 the NYPD's own internal mechanisms for learning those  
9 lessons, and, you know, frankly, plaintiffs' theory is  
10 that they don't have any. But we have to, we need to  
11 know what they did, what process they went through to  
12 try to learn those lessons even if at the end of the day  
13 they --

14 THE COURT: Well, again, process --

15 MS. STOUGHTON: -- thought, well --

16 THE COURT: Process yes as I use that term, but  
17 why do you need to know - let's pretend there's 50  
18 things in here and one of which is the three versus two  
19 police officers. Why do you need to know that part of  
20 it? Why do you need to know the substance of it?

21 MS. STOUGHTON: Well, I don't know we need the  
22 three versus two, but we need to know what things they  
23 looked at, what topics they looked at. For example --

24 THE COURT: Okay --

25 MS. STOUGHTON: Give me a second to give you an

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2 example.

3 THE COURT: -- number of police officers in  
4 cars. Okay.

5 MS. STOUGHTON: So I don't know if this is  
6 true, but if our expert told us that any responsible  
7 police agency would have looked at the numbers of police  
8 officers in cars during the 2020 protests and tried to  
9 figure out what about those numbers was good or bad, and  
10 then it turns out they didn't look at that at all during  
11 the Conforti review, then that seems highly relevant to  
12 establishing that the NYPD continues to have a poor  
13 process by which they will never learn lessons because  
14 they don't look at the right things or ask the right  
15 self-reflective questions.

16 THE COURT: But is there any evidence this, I  
17 mean this process, again, this process was terminated  
18 and did not play out and didn't happen the way it was  
19 supposed to. So I mean we're going in circles here. I  
20 guess I --

21 (interposing)

22 MS. STOUGHTON: I do understand - if I could,  
23 Your Honor. I do understand what you're saying, but I  
24 think the reason - if it were terminated and they said  
25 we're not doing anything, I think you'd have a point.

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2 But they didn't say that. They said we're terminating  
3 it because somebody else did the same thing and we're  
4 going to go with their conclusions because --

5 THE COURT: Right, which you have.

6 MS. STOUGHTON: -- maybe because it's  
7 duplication --

8 THE COURT: You did have that. If you didn't  
9 have that, then I would understand it, but you have the  
10 other thing, whatever this other thing is.

11 MS. STOUGHTON: Yes, but that other thing  
12 doesn't speak to the NYPD's own internal processes. And  
13 let me just bring another point, it's important to  
14 remember that there's an injunctive relief claim and  
15 that the defendants have claimed mootness. So to that  
16 point I think the next time there's a protest, we can't  
17 rely on the fact that Corporation Counsel and the  
18 Department of Investigation might undertake their own  
19 review. Once again, our clients would be relying on the  
20 NYPD's own internal ability to learn lessons. And so,  
21 again, what it does as an agency to look back at its own  
22 actions and learn lessons is critically important to  
23 establishing, you know, the risk of ongoing harm to our  
24 clients and backward looking the decisions made by NYPD  
25 officials and their systemic failures that led to the

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2 harm that our clients experienced.

3 THE COURT: Okay. I think I've probably  
4 reached the limit of whether I can do anything more on  
5 this today. So I think we're done. If I didn't say it  
6 before, but you should produce the documents that were  
7 ordered produced by the 21<sup>st</sup>, and I will probably issue a  
8 brief written order on the first thing we did, 774 I  
9 think it is, and eventually you'll hear something about  
10 the after-action review documents. And I think that's  
11 it for those two items, and that's all I'm prepared to  
12 do today.

13 Ms. Stoughton, anything else on 680?

14 MS. STOUGHTON: No, Your Honor, thank you.

15 THE COURT: Mr. Scutero, anything?

16 MR. SCUTERO: No, Judge, thank you.

17 THE COURT: Okay, thank you, everyone, good  
18 bye.

19 MR. SCUTERO: Thank you, have a good day.

20 (Whereupon the matter is adjourned.)

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C E R T I F I C A T E

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I, Carole Ludwig, certify that the foregoing  
transcript of proceedings in the United States District  
Court, Southern District of New York, In Re: New York  
Policing During Summer 2020 Demonstrations, docket  
#20cv8924, was prepared using PC-based transcription  
software and is a true and accurate record of the  
proceedings.

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Signature

Carole Ludwig

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Date:

February 14, 2023

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